84-46

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

SHIRLEY TYSON, as Natural Mother
and Attorney-in-Fact for
Timothy Patrick Tyson,

Petitioner,

v.

MARGARET HECKLER, Secretary of
Health and Human Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Section 210(a)(3)(A) of the Social Security Act, 42 U.S.C. 410(a)(3)(A) (1976 and Supp. V 1981), is unconstitutional on the following grounds:

a. Said provision is arbitrary and irrational, lacking a legitimate governmental purpose and lacking a reasonable relationship to any legitimate governmental purpose;

b. Said provision is unconstitutionally overinclusive; and,

c. Said provision is invidiously discriminatory.

PARTIES TO THE PROCEEDING

1. SHIRLEY TYSON, as Natural Mother and Attorney-in-fact for Timothy Patrick Tyson.

2. MARGARET HECKLER, Secretary of Health and Human Services.

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REFERENCE TO REPORTS OF OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is reported as Tyson v. Heckler, 727 F.2d 1029 (11th Cir. 1984). (Appendix A). The Order of the District Court for the Northern District of Florida, entered December 30, 1982, adopting the Report and Recommendation of the United States Magistrate, is unreported. (Appendix B).

GROUNDS ON WHICH JURISDICTION IS INVOKED

I

This cause is a Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to review the decision of that Court entered March 19, 1984. No motions for rehearing or for extension of time were filed.

II

Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1), in that this case, to which Petitioner was a party below, constitutes a civil matter decided below by a United States Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved herein are as follows:

1. The Due Process Clause of the Fifth Amendment to the United States Constitution -

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

2. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution -

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. 410(a)(3)(A) (1976 and Supp. V 1981), which states in pertinent part -

> (a) The term "employment" means any service ... of whatever nature, performed after 1950 ... by an employee of the person employing him, ... except that, in the case of services performed after 1950, such term shall not include -
>
> * * *
>
> (3)(A) service performed by an individual in the employ of his spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother.

STATEMENT OF THE CASE AND LOWER COURT JURISDICTION

I

On September 15, 1978 Mrs. Shirley Tyson, Petitioner herein, on behalf of her son, Timothy Patrick Tyson, filed an application for disability benefits with

the Social Security Administration.

Timothy Patrick Tyson was employed by his father who owned a sole proprietorship. Timothy was married, self-supporting and lived away from home. Timothy and his father had reported his wages and paid the proper Social Security tax as required by FICA. During the month in which Timothy turned 21 he was involved in a car accident and became totally disabled.

The Social Security Administration denied benefits to Timothy, on July 31, 1979, on the ground that he did not meet the insured status requirements since the wages he earned working for his father's business were excluded from coverage by Section 210(a)(3)(A) of the Social Security Act, 42 U.S.C. 410(a)(3)(A).

On reconsideration, the Secretary affirmed the earlier decision. Pursuant

to an expedited appeal agreement between the parties, constituting the final decision of the Secretary, further administrative proceedings were waived and Timothy's entitlement to benefits was established except for the exclusion mandated by 42 U.S.C. 410(a)(3)(A).

Petitioner then filed a Complaint in the United States District Court for the Northern District of Florida, Tallahassee Division, on September 22, 1981. The complaint sought reversal of the Secretary's decision and a finding that 42 U.S.C. 410(a)(3)(A) is unconstitutional.

The case was forwarded to a United States Magistrate who, by Report and Recommendation entered December 16, 1982, recommended that the final decision of the Secretary be affirmed.

On December 30, 1982, the district court entered its Order adopting the

Magistrate's report and recommendation in its entirety and entering judgment for the United States.

Petitioner filed her Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on February 18, 1983. After the parties' submission of briefs and oral argument, the Court of Appeals entered its judgment and decision on March 19, 1984 affirming the decision of the district court below. No motions for rehearing or extension of time were filed.

II

Jurisdiction in the United States Court of Appeals for the Eleventh Circuit was conferred by Section 28 U.S.C. 1291. Jurisdiction in the United States District Court for the Northern District of Florida, Tallahassee Division, was conferred by Section 42 U.S.C. 405(g).

REASONS FOR ALLOWING THE WRIT

This Court should grant a review on this Petition for Writ of Certiorari because there is an important question of federal law which has not been, but should be, settled by the Supreme Court.

This question relates to whether the federal courts should sanction laws of Congress which, although they may have passed constitutional muster at the time of their enactment many years ago, now fail to meet the tests of constitutionality because they no longer bear a significant relationship to current societal conditions and are internally inconsistent with other sections of the same Act.

Consideration by the Supreme Court of the questions framed by the instant case is important because if the lower

court decision is permitted to stand, the effect will be to allow a class of individuals to be discriminated against by the social security system without a current legitimate, rational, or justifiable governmental purpose. There are no other reported decisions dealing with the precise issues raised by this case.

Section 210(a) of the Social Security Act disallows credit for wages earned by workers under the age of twenty-one who are employed by their parents. In 1939, when Congress adopted the provision, the intent was to prevent collusion among families in the establishment of social security credits. H.R. Rep. No. 728, 76th Cong., 1st Sess. 46 (1939).

The harsh effect of the statute is demonstrated by Petitioner's case. He was twenty-one, married, self-supporting, living in a separate residence, and

working as a mechanic in a legitimate commercial enterprise. He and his employer-father had even made the correct contributions to the social security system, although it was later determined that the contributions had been erroneously paid by Petitioner and his father and accepted by the Social Security Administration. Yet, when Petitioner became disabled his benefits were denied because of a statute enacted by Congress in 1939 and based upon an irrebuttable presumption of family collusion.

It is important to note that there has been no congressional determination that the problem of collusion within families is one that actually existed at the time of the statute's enactment or one that exists today. Persons over the age of twenty-one who work for their parents have never been excluded from

coverage. Parents who work for their children were originally excluded from coverage, but subsequent amendments eliminated that bar. The 1960 Amendments, subsec. (a)(3) Pub. L.86-778 Section 104(a). Further, persons under the age of twenty-one who work for corporations solely owned by their parents are entitled to benefits. See 20 CFR §404.1015(b). Congress apparently determined that the potential for collusion is not a problem to be guarded against in those cases, even though the family relationships are identical to the case at bar.

If the statute furthers a legitimate government goal by excluding a class which is viewed as having a high degree of potential for familial collusion, then that potential for collusion must lie soley in the age of the child, since

Congress has approved benefits for participants in all other possible identical family relationships.

But, as Judge Kravitch indicated in her concurring opinion below:

> . . . Congress should be cognizant that §410(a)(3)(A)'s reliance on the age of twenty-one as a basis for determining eligibility for disability benefits, although not wholly irrational, no longer bears a significant relationship to reality or other provisions of the Social Security Act. Perhaps in 1939, when the statute was passed, the age of twenty-one was a realistic dividing point, but, in light of the Twenty-sixth Amendment and the legislative trend toward using eighteen years of age as the age of majority, twenty-one no longer is a reliable benchmark of an individual's independence from his parents. Indeed, 42 U.S.C. §402(d) premises eligibility for child's insurance benefits on the child being under eighteen years of age. Juxtaposing §410(a)(3)(A) and §402(d) thus highlights the problem: one is a "child" in the eyes of the law until twenty-one if one works for his parents but only a "child"

> until eighteen if one seeks child's insurance benefits.
> . . . .

(Footnotes omitted). Tyson v. Heckler, 727 F.2d 1029, 1032 (11th Cir. 1984).

The majority below premised its decision on the proposition that the original purpose of Congress was to prevent fraud on the social security system, also concluding that such a purpose is not presently arbitrary and capricious. Id. at 1031.

Since social security benefits are now given to all other possible parent-child employment relationships, it should be clear that the post-1939 amendments to the statute, passage of the Twenty-Sixth Amendment to the U. S. Constitution, the legislative trend among states to lower the age of majority to eighteen years, and the internal inconsistency within the Social Security Act itself all combine to make the current statutory standard of

twenty-one years in Section 210(a)(3)(A) an arbitrary and capricious standard for denial of benefits.

CONCLUSION

The questions of Federal and Constitutional law presented by this case are substantial and fundamental, clearly meriting this Court's attention. Petitioner, therefore, respectfully requests this Court to issue the Writ of Certiorari and set this case for full briefing and argument.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition For Writ of Certiorari were furnished this 13th day of June, 1984, by United States Mail, in accordance with the applicable Supreme Court Rules, to each of the following Counsel who represent the parties required to be served.

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APPENDIX

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SHIRLEY TYSON, as Natural Mother
and Attorney-in-Fact for
Timothy Patrick Tyson,
Plaintiff-Appellant.

v.

MARGARET HECKLER, Secretary of
Health and Human Services,
Defendant-Appellee.

No. 83-3128

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984

Appeal from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

GODBOLD, Chief Judge:

This appeal, in a social security case, raises the constitutionality of 42 U.S.C. Sec. 410(a)(3)(A) (1976 and Supp. V 1981), which provides in pertinent part:

> (a) The term "employment" means any service performed . . . by

> any employee for the person employing him . . . except that . . . such term shall not include
>
> (3)(A) Service performed by . . . a child under the age of twenty-one in the employ of his father or mother.

The district court found that the statute had a rational basis, was not constitutionally overinclusive, and therefore was constitutional. We affirm.

Plaintiff's son, Timothy, was employed by his father, who owned a sole proprietorship. Timothy was married, self-supporting, and lived away from home. Timothy and his father had reported his wages, and the proper Social Security tax had been paid as provided by FICA. During the month in which Timothy turned 21 he was involved in a car accident and became totally disabled.

Timothy's mother filed an application for Social Security disability insurance benefits with the Social Security Administration. The agency denied benefits on the

ground that Timothy did not meet the insured status requirements because the wages he earned from his father's business were excluded from coverage under Sec. 410(a)(3)(A). On reconsideration the agency affirmed the denial of benefits because of the statute's exclusion. The Secretary of Health and Human Services and the plaintiff then executed an expedited appeals agreement under which further administrative proceedings were waived and Timothy's entitlement to benefits was established except for the exclusion mandated by Sec. 410(a)(3)(A). This agreement constituted the final decision of the Secretary.

Plaintiff brought this action in district court seeking a finding that Sec. 410(a)(3)(A) is unconstitutional because it is arbitrary and irrational, lacks a legitimate government goal, is not related to a legitimate government goal,

and is overinclusive. The district court rejected these arguments and found the statute constitutional.

Social security legislation is tested under a rational basis standard. See Weinberger v. Salfi, 422 U.S. 749, 768-70, 95 S.Ct. 2457, 2468-69, 45 L.Ed.2d 522 (1975). As the Salfi court explained:

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

Id. at 768, 95 S.Ct. at 2468 (quoting Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960)). The Court has pointed out, however, that the rational basis standard is "not a toothless one." Mathews v. Lucas, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764, 49 L.Ed.2d 651 (1976).

Legislative history indicates that prevention of collusion was the intent of Congress when it adopted this provision in 1939. H.R.Rep. No. 728, 76th Cong., 1st Sess. 46(1939). Prevention of fraud on the Social Security system is a legitimate government goal. See Salfi, 422 U.S. at 777-84, 95 S.Ct. at 2472-76. The statute furthers this legitimate government goal by excluding a class of people whose situation suggests a high potential for collusion. See id. at 780, 95 S.Ct. at 2474. Furthermore, "Congress could rationally have concluded that any imprecision from which it [the statute] might suffer was justified by its ease and certainty of operation." Id.

That the age of majority in many states is now 18 rather than 21 does not affect the constitutionality of the statute. The age of majority and the age limitation for exclusion of employment by

parents from Social Security coverage implicate different concerns. When Congress enacted Sec. 410(a)(3)(A), it sought to prevent fraud on the Social Security Administration by parents who employ their children. Reduction in the age of majority does not necessarily reduce or even affect the likelihood of fraud between parents and children when children seek employment. Furthermore, reduction of the age limitation is a choice for Congress, and as long as Congress's original purpose of preventing fraud on the Social Security system by parental employment of children under 21 is not presently arbitrary and irrational, change in the age of majority in states does not change our analysis of the statute.

The "irrebutable presumption" cases of Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52

(1974), Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), and Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) do not require the government to make an individualized determination of collusion. The Salfi court answered this argument when it stated that "these [irrebutable presumption] cases are not controlling on the issue before us now." Salfi, 422 U.S. at 771, 95 S.Ct. at 2470. The Court distinguished Stanley and LaFleur on the ground that the interests in those cases, unlike a noncontractual claim to government funds, enjoyed "constitutionally protected status." Id. at 771-72, 95 S.Ct. at 2470. The Salfi court further explained that Vlandis was distinguishable because it involved a different issue, making "plainly relevant evidence . . . inadmissible." Id. The irrebutable presumption cases do not control this case.

In 1960 Congress repealed another provision of the section at issue that had excluded from coverage employment of a parent by a child. This action does not make the remaining provision arbitrary. Congress could have rationally concluded that there likely would be less occasion for fraud when children employed their parents because such a situation would occur less often. Furthermore,

> [e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955) (citations omitted). Congress's repeal of the provision excluding coverage of employment of a parent by a child does

not render the statute unconstitutional.

The statute is not unconstitutionally overinclusive. Congress is not required to draw lines with great precision when it enacts social welfare legislation. Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970). As the Salfi court noted,

> the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute . . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individualized determinations justified the inherent imprecision of a prophylactic rule.

Salfi, 422 U.S. at 777, 95 S.Ct. at 2472-73. Under this standard, the statute is constitutional. Exclusion of children under 21 employed by their parents protects against the occurrence of fraud. Making individualized determinations of collusion would not only be expensive but could also be difficult, as it may be possible to structure a situation so that no collusion appears although fraud actually exists. Consequently, potential overinclusiveness does not make the statute unconstitutional.

That the statute does not exclude from coverage children employed by their parents' wholly-owned corporation or partnership does not render the statute unconstitutional. Congress reasonably could have concluded that less likelihood of collusion exists with employment by partnerships and corporations, as many such organizations are not wholly-owned, and

consequently people other than a child's parents play a role in hiring the child. Such a difference in treatment is not arbitrary and does not render the statute unconstitutional.

AFFIRMED.

KRAVITCH, Circuit Judge, concurring:

I agree, for the reasons stated in the majority's opinion, that 42 U.S.C. §410(a)(3)(A) is constitutionally valid under Weinberger v. Salfi, 422 U.S. 749 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), as a prophylactic rule not "utterly lacking in rational justification." Id. at 768, 95 S.Ct. at 2468. Although the statute is valid, I believe it important to point out its harsh results in this case: the plaintiff's son, a married, self-supporting individual living away from home, will be denied disability insurance benefits

although no one contends that he was in collusion with his father or did not properly pay his Social Security taxes.

Such harsh results may be to a degree an inevitable consequence of prophylactic rules. In my view, however, Congress should be cognizant that §410(a)(3)(A)'s reliance on the age of twenty-one[1] as a basis for determining eligibility for disability benefits, although not wholly irrational, no longer bears a significant relationship to reality or other provisions of the Social Security Act. Perhaps in 1939, when the statute was passed, the age of twenty-one was a realistic dividing

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[1] Section 410(a)(3)(A) refers to an individual under twenty-one years of age as a "child." In light of changed circumstances since the section's enactment in 1939, see discussion infra, the use of the term "child" in itself shows that the section is premised on antiquated notions of when an individual becomes independent from his parents.

point, but, in light of the Twenty-sixth Amendment and the legislative trend toward using eighteen years of age as the age of majority, twenty-one no longer is a reliable benchmark of an individual's independence from his parents. Indeed, 42 U.S.C. §402(d) premises eligibility for child's insurance benefits on the child being under eighteen years of age.[2] Juxtaposing §410(a)(3)(A) and §402(d) thus highlights the problem: one is a "child" in the eyes of the law until twenty-one if one works for his parents but only a "child" until eighteen if one seeks child's insurance benefits. In my opinion, the incongruity between §410(a)(3)(A) and other provisions of the

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[2] Section 402(d) makes exceptions for individuals who are disabled before the age of twenty-two or who are still "full-time elementary or secondary school student[s]" under the age of nineteen.

Social Security Act, and the questionable usefulness of the age of twenty-one for determining whether an individual is independent from his parents, deserve congressional attention.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SHIRLEY TYSON, as Natural Mother and Attorney-in-Fact for TIMOTHY PATRICK TYSON,

Plaintiff,

vs. TCA 81-0976

RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

Defendant.
_____/

O R D E R

This cause comes on for consideration upon the magistrate's report and recommendation dated December 14, 1982. All parties previously have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to Section 636(b)(1), Title 28, United States Code. The court having considered the report and recommendation and all objections thereto timely filed by the parties, it is now

determined that the report and recommendation should be adopted.

Accordingly, it is now

ORDERED:

1. The magistrate's report and recommendation is adopted in its entirety by this court and it is hereby found that the decision of the Secretary is supported by substantial evidence and it is affirmed.

2. Judgment shall be entered for the defendant.

3. The clerk is hereby directed to prepare and enter a judgment in favor of the defendant pursuant to Rule 58, Federal Rules of Civil Procedure.

DONE AND ORDERED this 30th day of December, 1982.

/s/ William Stafford
WILLIAM STAFFORD
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SHIRLEY TYSON, as Natural Mother and Attorney-in-Fact for TIMOTHY PATRICK TYSON,

Plaintiff,

vs. TCA 81-0976

RICHARD S. SCHWEIKER, Secretary of Health and Human Services,

Defendant.
_____/

REPORT AND RECOMMENDATION

The plaintiff, Timothy P. Tyson, brought the above-styled civil cause under the provisions of Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), seeking judicial review of the decision of the Secretary denying the plaintiff's claim for disability insurance benefits under the Act. The claim was denied by the Secretary because of the plaintiff's inability to meet the requirements under Section 223 of the Social Security Act,

42 U.S.C. 423. This particular section dealing with entitlement to disability insurance benefits, requires an individual whose disability began before age 24 to have accumulated credits for six calendar hours of work during the 12 quarter period ending with the quarter in which such person became disabled. An individual is entitled to a social security credit for each calendar quarter in which has been paid $50.00 or more in wages, although an individual may not earn any more than four social security credits in any one year.

In the instant case, it was undisputed that the plaintiff is disabled and that he was disabled in June, 1978, the month in which he attained the age of 21. In order to meet the special earnings requirement for disability benefits the plaintiff would need at least six social security credits. The plaintiff, according to the Secretary, does not possess any credits

whatsoever because of the effect of Section 210(a)(3)(A) of the Social Security Act, 42 U.S.C. 410(a)(3)(A). This provision of the Social Security Act excludes from the definition of "employment" under the Act, services performed by a child under the age of 21 who is working in the employ of his father or mother. Wages posted to the earnings record of Timothy P. Tyson were found to be wages from family employment and, the Secretary reasoned, as such were erroneously credited to his account. With the correction of the earnings record and the deletion of the credits first allowed the plaintiff was found to be unable to meet the earning requirements for insured status under Section 223 of the Act. It was undisputed that but for the effect of Section 210(a)(3)(A), the plaintiff would, in fact, meet the requirements for insured status

under the Act.

42 U.S.C. 410 provides in pertinent part:

> (a) The term "employment" means any service . . . of whatever nature, performed after 1950 . . . by an employee of the person employing him, . . . except that, in the case of services performed after 1950, such term shall not include -
>
> * * * *
>
> (3)(A) Service performed by an individual in the employ of his spouse, and service performed by a child under the age of 21 in the employ of his father or mother.

The basis of the plaintiff's attack on the constitutionality of Section 210(a)(3)(A) of the Social Security Act is that the section is arbitrary, capricious and that it amounts to impermissible and invidious discrimination because there is no legitimate governmental purpose for the statute and the statute is not reasonably related to legitimate government purpose. It is well understood that the Social Security Act constitutes a broad-based

social welfare program for the economic protection of wage earners and their families. Under Title II of the Act, Congress has established programs to provide wage earners and their dependents with benefits upon the death, retirement or disablement of the wage earner. Entitlement is certainly, however, constrained by various eligibility requirements designed by Congress to serve the purpose of the Act within its economic limitations. Unquestionably Congress in making these legislative determinations is vested with considerable latitude and the statute, as noted by the defendant Secretary, " . . . is entitled to a strong presumption of constitutionality" if challenged. Mathews v. deCastro, 429 U.S. 181, 185 (1976).

The benchmark standard by which the constitutionality of the attacked statute must be measured is whether there is a

"rational basis" for the statute as written. See, e.g., Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); Jimenez v. Weinberger, 417 U.S. 628 (1974); and Dandridge v. Williams, 394 U.S. 471 (1970). Here we scrutinize the legislative classification disallowing social security credits to persons under the age of 21 who work for their parents. The issue is: Is this a "patently arbitrary" classification or does it bear a rational relationship to a legitimate governmental interest? The defendant points to the legislative history of the 1939 amendments, and particularly to a discussion of the statute in House Report No. 728. The purpose of the exclusion, set out in that discussion is as follows:

> A new paragraph (4) excludes service performed by an individual in the employ of his

> son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his parent. This exclusion is already contained in the Federal unemployment tax provisions of the existing law and is considered advisable because of the possibility offered by such employment for collusion in building up credits in certain cases which offer a high return for a small amount of contributions.

H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939).

Certainly it is evident that the Congress, in enacting this particular statute, sought to prevent owners of small businesses and industries from placing their own offspring on the payroll merely as a device to enable such offspring to accumulate valuable social security credits without having actually earned the same. Whether or not in this particular instance credits would have been properly earned is immaterial. Congress sought to protect the social security trust fund from fraud

by a broad statutory preclusion rather than requiring an individual case-by-case examination. Such action is entirely within the legislative prerogative of Congress and this court cannot find that the action of the Congress was "arbitrary and capricious, or that the statutory provisions entirely lacks a rational relationship to a legitimate governmental interest."

The undersigned finds persuasive the logic of the United States District Court for the Eastern District of Texas in an identical challenge to Section 210(a)(3)(A). In that case District Judge William M. Steger wrote:

> Clearly, the purpose of Congress in trying to protect the fiscal integrity of the program is reasonable. The possibility of sham employer-employee relationships existing within the family for the purpose of obtaining social security coverage is real. It is up to Congress to protect against such a possibility and it can hardly

> be said that the classifications created by the statute as enacted are clearly wrong. The fact that some inequitable situations result from the application of the parent-child employment relationship statute is regrettable, but hardly a denial of equal protection.

Higginbotham v. Harris, Civil No. TY-77-95-CA (E.D. Tex., 1980). A copy of this opinion has been included by the Secretary as an attachment to his memorandum.

Section 210(a)(3)(A) makes no invidious distinctions between beneficiaries but is designed solely to protect the fiscal integrity of the social security program without the requirement of an exhaustive case-by-case analysis. Certainly the approach of Congress was a practical one and one that has effectively pretermitted a deluge of litigation as to entitlement for those claiming credits earned in family businesses. It is not for this court to determine whether the decision of Congress in this legislative

matter was the wisest decision but only to determine whether Congress acted arbitrarily and capriciously without any logical basis so as to deny fundamental constitutional rights. In molding the law as to social security disability benefits entitlement it is clear that Congress did not act without reason and that Section 210(a)(3)(A) of the Social Security Act is not inherently unconstitutional.

Pursuant to 28 U.S.C. 636(b)(1) and in accordance with Rule 30(B), Rules for the United States District Court for the Northern District of Florida, the parties to this action may serve and file written objections to this report and recommendation within ten (10) days after being served with a copy of the same. Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review

of factual findings. U.S. v. Warren, 687 F.2d 347 (11th Cir. 1982); Hardin v. Wainwright, 678 F.2d 589 (5th Cir., Unit B, 1982); Nettles v. Wainwright, 656 F.2d 986 (5th Cir. 1981).

It is therefore now respectfully RECOMMENDED that an order be made and entered by the District Court as follows:

1. The decision of the Secretary is supported by substantial evidence and should be affirmed.

2. Judgment should be entered for the defendant.

In Chambers at Pensacola, Florida, this 14th day of December, 1982.

/s/ Robert L. Crongeyer, Jr.
ROBERT L. CRONGEYER, JR.
United States Magistrate